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Delegation of Legislative Power - The Constitutionality of the Economic Stabilization Act of 1970

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Comments

Delegation of Legislative Power—the Constitutionality of the Economic Stabilization Act of 1970

With the passage of the Economic Stabilization Act of 1970,[1] a very fundamental constitutional problem has once again come to the fore. The Act has granted to the President, in the very broadest terms, the power to regulate and control the economy of the United States. Such a pervasive grant of authority carries with it various constitutional implications; but the concern here is with the congressional delegation of power to the President.

Article I, section 1, of the Constitution provides, "All legislative powers herein granted shall be vested in a Congress of the United States. . . ." This is a very broad and a very general statement of an intent to establish a congress, and to confer upon it the power to make the laws. But, beyond this, what does it mean? What effect has this provision on the manner in which Congress seeks to exercise its legislative power?

In case after case, for more than 150 years, the Supreme Court has faced these questions. The long line of answers which the Court has given comprises what has come to be known as the delegation doctrine.

It is important to closely examine this doctrine, and the theory which underlies it. If this doctrine is to be employed to weigh the constitutionality of the Economic Stabilization Act, something must first be known about the measuring device to be employed.

I. Underlying Theory—Separation of Powers

Article I, section 1, places all legislative powers in a Congress; Article II, section 1, places all executive powers in the President; while Article III, section 1, places judicial powers in a Supreme Court, and in those inferior courts which may be provided. These provisions do more than

1. 12 U.S.C. § 1904, note (1964).

that however, they reflect a strong commitment to the theory of a separation of powers. This is a very fundamental theory, the wisdom of which can be traced down through the history of human experience and thought. Its principles were enunciated by Aristotle in his *Politics*, by Locke in his *Two Treatises of Government*, and by Montesquieu in his *Spirit of the Laws*.

The basic theory is very simple; in order for liberty and justice to prevail under government, it is necessary that no person or body be allowed to wield absolutely, or even predominantly, the powers of government. Montesquieu phrased it:

> Political liberty . . . is there only when there is no abuse of power, but constant experience shows us, that every man invested with power is apt to abuse it, and to carry his authority as far as it will go . . . . To prevent this abuse, it is necessary from the very nature of things, power should be a check to power . . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[2]

Colonial belief in separation of powers was a product of both philosophical precedent, and their own historical experiences.[3] A distaste for executive and judicial offices controlled by royal governors and monarchs contributed immensely toward their affinity for separation of powers.[4] Many state constitutions demonstrated the strong belief in separation of powers by explicitly incorporating the theory.[5] For example, the Massachusetts Constitution provides:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[6]

Separation of powers in the Federal Constitution was never so rigidly

2. EBENSTEIN, GREAT POLITICAL THINKERS 428 (1965).
3. Forkosch, *The Separation of Powers*, 41 U. COLO. L. REV. 529 (1969).
4. *Id.* at 530.
5. *Id.*
6. MASS. CONST. art. XXX.

stated; but the establishment of a tri-partite system nevertheless evidences the theory in practice. The vesting of the legislative, executive, and judicial powers in three distinct branches clearly reflected a deep distrust for centralized governmental powers.[7]

The less rigid formulation of the Federal Constitution also evidences a purpose to reconcile the theory of separation of powers with the need for effective national government.[8] The separation of powers approach as established in the Constitution was meant to be a workable concept; and this was as true in 1789 as it is today.[9] As one writer has pointed out:

> [W]e should in sum, keep in mind that the great end of the theory is to prevent absolutism, by dispersing in some measure the centers of power. It is not eternally to stratify our governmental arrangements in the particular mold of 1789. If the exact form at any moment of history were taken as a literal prescription, it would strangle the process of government.[10]

The job of defending the separation of powers, while permitting effective governmental operation, has devolved from the very beginning, upon the courts. This is as it should be, for it is consistant with the rationale of the separation doctrine. If a tri-partite system, based on separation of powers, is to be effective, each co-equal branch must perform the checking function intended by the Constitution. The courts are to effectuate the Constitution and the laws of the land; and this involves a maintenance and adherence to the policies and principles inherent in the Constitution and the laws.

Through the years the Court has played a significant role in balancing the necessities of government with the requirement of separation of powers. The role of the Court as an arbiter of the extent and scope of governmental powers has been a significant limitation on legislative and executive authority.[11]

The process by which the courts have balanced necessity with theory has come to be known as the delegation doctrine. Let us now examine the process, and the doctrine.

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7. Forkosch, *supra* note 3, at 531.
8. *Id.*
9. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 32-33 (1965).
10. *Id.* at 29.
11. Forkosch, *supra* note 3, at 533.

II. Evolution of the Delegation Doctrine—Pragmatic Separation of Powers

The delegation doctrine is based on the separation of powers theory. To understand the doctrine, it is necessary to understand what the separation of powers theory requires in practice.

One must be aware that when Montesquieu wrote his treatise, he had in mind a "political theory, which at that time was nowhere realized in fact."[12] Likewise, when the framers of the Constitution wrote that great document, the theory had not yet been put into practice; and "historically there had never been a government in which legislative, executive, and judicial functions—or at least two of them—were not united in the same branch."[13] The result being, that no one, including the founding fathers, and the Supreme Court which was about to face the question, knew exactly the extent to which governmental powers could effectively be separated. It is fairly certain, however, that the theory was never intended to be a rigid one. It has been said that "separation of powers has probably always been understood to be an expression of a general attitude, rather than an inexorable table of organization. So understood it is a valuable element of political wisdom."[14]

In the earliest cases, in which delegation of legislative power was attacked as violative of the Constitution, the Court realized that a rigid separation of functions was not practical. It also realized that no absolute formula could be used in determining which power must be exercised by Congress alone, and which powers could be delegated. However, it was clear the most important factor the Court would have to take into consideration would be the need for effective governmental operation.

The issue which arose in those early cases has continued to be the same issue raised in delegation cases today. Is the power to perform a given governmental task being properly divided and exercised, as between the legislative branch which must initiate policy, and the executive branch which must execute policy? Stated in another fashion —has Congress adequately exercised its duty and its power to effectuate policy, or has it failed to do so by improperly delegating this power to an executive or administrator?

To state the problem in this manner would seem to imply that the

12. Cheadle, *The Delegation of Legislative Functions*, 27 Yale L.J. 892, 894 (1918).
13. *Id.*
14. L. Jaffe, *supra* note 9, at 28-29.

power necessary to perform a governmental task can be divided with precision between a legislative body and an executive body. By stating the issue in this manner, it was not intended that such an implication should arise. Such an implication carries with it the erroneous assumption that governmental power can be systematically and schematically defined according to some pre-existing notion. Both the nature and quantity of governmental power varies in relation to each specific governmental task, the accomplishment of which is sought.

By so phrasing the issue, I mean to raise the specter of an approach to congressional delegation and separation of powers which is basically a pragmatic one.

When facing a delegation case, the only absolute with which the court can deal is Article I of the Constitution. But this is not much in the way of an absolute when one considers that it merely establishes a Congress, and gives to that Congress the power to initiate policy. It does not require that Congress perform all policy-making functions, but it certainly requires that it perform some.

How much policy making power must Congress exercise? As has already been said, the answer does not lie in a schematic division of functions, but in a pragmatic evaluation of the necessities of government. If separation of powers is to be a working concept, it must be a pragmatic concept.

When the founding fathers retired the Articles of Confederation for the new Constitution, their primary purpose was to establish an effective, working system. Yet, separation of powers was an important consideration, not to be lightly disregarded. Although the founding fathers abandoned the ineffectual Articles primarily to establish more effective government; it must not be forgotten they also abandoned the unitary system of government established under the Articles in favor of a system in which powers were separated.[15] A balancing between effective government and separation of powers was certainly intended and expected. They must surely have been meant to work in harmony.

For the courts, which have faced the constitutional issue, a pragmatic approach of this type necessitates a case-by-case analysis. The fine constitutional line between proper use of congressional power, and improper delegation, has never been drawn with precision. The factors which go into determining whether Congress has properly exercised a

15. The Articles of Confederation created only one arm of government—Congress. *See* U.S. ARTICLES OF CONFEDERATION art. V.

sufficient amount of its power vary from case to case. Nevertheless, the pragmatic approach has been the fundamental thread which has run through every delegation case which the Supreme Court has decided.

Although pragmatic separation of powers is the basic approach underlying the Court's decisions, the concept has taken many forms, and has been verbalized in many ways. The sum total of these various formulations and verbalizations has come to be called the delegation doctrine.

Some of the early cases, such as *The Brig Aurora*[16] and *Field v. Clark*[17] created confusion in the analysis of the delegation doctrine. Probably the earliest case, *The Brig Aurora,* failed to raise the delegation issue in a distinct fashion; and its decision on the question did little to guide the development of the doctrine.

Field v. Clark seems to have done more to hamper the developing doctrine than any other case. The delegation issue was raised, and decided, on the basis of very broad generalities. The most widely quoted statement of the case, and a prime example of the broad and general language to be found therein, is as follows:

> That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.[18]

The language of Article I was never meant to be given so rigid a formulation. To do so, would be to strip the Constitution of its flexibility, vitality, and effectiveness. Yet, this language of *Field* has come to be strictly interpreted, and for years the Court ritualistically employed it. The language has come to stand for the narrow proposition that legislative powers cannot be delegated.[19] It became routine for the Court to invoke the language of *Field*—not to strike down delegations, but to permit them. How could such an anomalous state of affairs be reconciled? It was relatively easy. The Court became involved in a labeling game. It became obvious that Congress could delegate any of its powers that the Court did not choose to call legislative.[20] For a period of time it even became fashionable for the Court to decide

16. 11 U.S. (7 Cranch) 382 (1913).
17. 143 U.S. 649 (1892).
18. *Id.* at 692.
19. *See* Union Bridge Co. v. United States, 204 U.S. 365, 385 (1906); Monongahela Bridge Co. v. United States, 216 U. S. 177, 192 (1909); Unitel States v. Grimaud, 220 U.S. 506 (1910).
20. Fisher, *Delegating Power to the President,* 19 J. PUB. L. 251, 273 (1970).

delegation cases by merely referring to prior cases which had invoked the "non-legislative delegation" label. A prime example can be found in *First National Bank v. Fellows ex rel. Union Trust Co.*[21] where the Court said:

> [I]t is necessary to do no more than say that a contention which was pressed in argument . . . that the authority given by the section . . . was void because conferring legislative power on the board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them.[22]

The delegation decisions appear to be strictly result oriented; and the cases have caused one writer to formulate the following syllogism:

> (1) MAJOR PREMISE: Legislative power cannot be Constitutionally delegated by Congress;
> (2) MINOR PREMISE: It is essential that certain powers be delegated to administrative offices and regulatory commissioners;
> (3) CONCLUSION: therefore, the powers thus delegated are not legislative powers.[23]

This seemingly result oriented approach, was the consequence of a "zombie" like use of the language in *Field.* The process has been explained as follows:

> It is interesting to note how often in the development of Anglo-American law the courts have reached a conclusion quite in accordance with the duty then resting upon them of balancing the interests involved; yet when the court is pressed to formulate the grounds of the decision a reason is given which is applicable neither logically or historically. When later judges decide new phases of the same question they are apt to be led astray by a too literal application of the supposed reason offered for the former decision.[24]

If we are to understand the true decision-making processes of the Court in the delegation cases, we must look behind the ritualistic language invoked. Why does the Court sustain delegations of power? The answer does not lie in the general language of *Field*; it lies in a pragmatic evaluation of the necessities of government in relation to separation of powers. In those cases which have upheld delegation of power, the Court has obviously come to the conclusion that the delega-

21. 244 U.S. 416 (1916).
22. *Id.* at 427.
23. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 429 (1941).
24. Cheadle, *supra* note 12, at 893.

tion involved is necessary for effective governmental operation; and therefore must be sustained. It has been said that "the courts classify these cases in which power is delegated after the court has decided to sustain or reject it, and the terms applied therefore become a sort of ex post facto justification or prohibition, according as the thing is deemed necessary or not."[25] The balancing of the everyday necessities of government against the requirement of separation of powers has always been the essence of the Court's analytical process.

A more accurate statement of the previously mentioned syllogism would be as follows:

> (1) MAJOR PREMISE: it is essential that certain powers be delegated to an executive, or administrative officer;
> (2) MINOR PREMISE: legislative power should not be lightly delegated lest it have a harmful effect on constitutional separation of powers;
> (3) CONCLUSION: pragmatic separation of powers will not forbid delegation when Congress has exercised its powers as far as is practicable, and has chosen to delegate needed powers in order to achieve effective governmental operation.

There is one early case—a contemporary of *Field*—in which the underlying pragmatic separation of powers approach can be readily seen. In the case of *Wayman v. Southard*[26] the Judiciary Act of 1789[27] was challenged as an unconstitutional delegation of legislative power. The Act gave the courts the power to regulate their practices and procedures. The delegation was upheld, with the Court per Chief Justice Marshall saying:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[28]

The Chief Justice was clearly satisfied that Congress had exercised as much of its policy-making function as was necessary on the matter of court procedures. Indeed, to require Congress to exercise greater control over court procedures would have been to cripple the effectiveness of the court system. Separation of powers could not possibly be read so as to bring about this result. Marshall said:

25. *Id.* at 920.
26. 24 U.S. (10 Wheat.) 1 (1825).
27. 1 Stat. 73 (1789).
28. 24 U.S. (10 Wheat.) 1, 43 (1825).

> That the legislature may transfer this discretion to the Courts, and enable them to make rules for its regulation, will not, we presume, be questioned.[29]

At the same time, Marshall could not say exactly where the line was to be drawn between adequate congressional exercise of policy-making power, and inadequate exercise of this power. He said:

> The difference between the departments undoubtedly is, that the legislative makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry. . . .[30]

Wayman differed greatly from *Field* in its approach. The Court made an honest, realistic, and accurate statement of the separation-delegation problem. The Court in *Wayman* admittedly did not have the answer to the problem; but at least it was willing to face the problem, and solve it on a case by case basis if necessary. Why the *Field* approach was followed with more consistency than *Wayman* is purely a matter of conjecture. The most probable answer is that the early delegation cases involved what were clearly permissible delegations. The necessity of the delegation so far outweighed the possible effect on separation of powers that it did not even give rise to a substantial issue.[31] In cases of this type it was not necessary to apply the more thoughtful approach of *Wayman*; it was sufficient to apply the generalities of *Field* in order to sustain the delegation. When the Court began to face more difficult delegation problems it could not deal with them adequately. The Court was forced to move away from the *Field* generalities, and toward a more open reliance on the pragmatic separation of powers approach.

Eventually the Court began to make attempts at establishing a rule by which delegations could be judged as either valid or invalid. Two cases indicative of the attempt are *Buttfield v. Stranahan*[32] and *J. W. Hampton, Jr. & Co. v. United States*.[33]

In *Buttfield* the Court sought to establish a rule within the context of the statement in *Field*—that legislative power could not be delegated. This case involved the granting of authority to the Secretary of the

29. *Id.* at 45.
30. *Id.* at 46.
31. *See* Interstate Commerce Commission v. Goodrich Transit Co., 224, U.S. 194 (1911).
32. 192 U.S. 470 (1904).
33. 276 U.S. 394 (1928).

Treasury to establish uniform standards of purity, quality and fitness for tea being brought into the states. The Court upheld the delegation on the grounds that the statute evidenced a congressional purpose to exclude the lowest grades of tea. Chief Justice White said that Congress had established a "primary standard,"[34] and that "Congress had legislated on the subject as far as was reasonably practicable;"[35] with the Secretary being granted "the mere executive duty to effectuate the legislative policy declared in the statute."[36]

The pragmatic approach of the Court is obvious, despite the ceremonial incantations that the power delegated was not legislative. Whether it was, or was not legislative, is unimportant. Although—strictly as an aside—it would seem that the power to establish standards, against which imported tea is to be judged, is closer to a legislative function than to an executive one. Nevertheless, the pragmatic overtones are clear. It would be absurd to require Congress to establish regulations for imported tea. Certainly there are more important matters to which the Congress of the United States can devote its time. As a practical matter, the Court would not, and should not think twice about allowing such a delegation to stand.

Let us return to the rule which seems to be evolving out of this case. The notion that Congress has established a "primary standard" seems to be the key. What is the effect of fixing a primary standard? It certainly seems to imply some minimum amount of congressional policy making. Yet the extent to which Congress would be required to exercise its policy making power was unclear. The rule—in its ill defined state was a very simple one—if Congress has established a primary standard, then the delegation is valid. The movement away from *Field* and toward a straightforward statement of the pragmatic approach had now begun.

In the *Hampton* case, the Court was still attempting to formulate some rule by which proper congressional policy making could be distinguished from impermissible delegation. The rule of *Hampton* is not greatly different from that of *Buttfield.* Instead of "primary standard," *Hampton* spoke of an "intelligible principle."[37] The Court per Chief Justice Taft said:

34. 192 U.S. 470, 496 (1904).
35. *Id.*
36. *Id.*
37. 276 U.S. 394, 409 (1928).

> If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to . . . act is directed to conform, such legislative action is not a forbidden delegation of legislative power.[38]

It is significant that the Court was still seeking a rule by which congressional delegation could be judged; but of even greater significance is that for the first time the Court was openly willing to admit that Congress was in fact delegating legislative power. The Court's specific language was—"such legislative action is not a forbidden delegation of legislative power."[39] At last the Court began to free itself from the heretofore religiously applied statement of *Field.* At long last the Court began to call a spade a spade. Now it would begin to more freely approach the delegation problem, as it had in *Wayman,* on a purely pragmatic basis.

It is interesting to note that the Court was virtually compelled to deny the approach of *Field.* It was faced with a delegation which would not allow itself to be labeled as non-legislative. The case was too difficult to be handled by generalities. A solution to the case required a more forthright statement of the problem, and some in depth analysis. To cover up the delegation in *Hampton* by means of the old labeling game, would have been simply stretching it too far.

The *Hampton* case involved the Tariff Act of 1922.[40] The Act provided:

> [W]henever the President, upon investigation of the differences in cost of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find . . . that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principle competing country he shall—ascertain said differences and determine and proclaim the charges in classification or increases or decreases in any rate of duty provided in this act. . . .

The President was in effect given the authority to repeal existing tariff rates and establish new ones. It would have been virtually impossible for the Court to refer to these powers as executive.

Beneath the shifting verbiage, it is fairly easy to spot the pragmatic

38. *Id.*
39. *Id.*
40. Act of Sept. 21, 1922, ch. 356, 42 Stat. 858.

analysis of the Court silently at work. The Congress had established a tariff program designed to equalize production costs. Delegating the power to update the tariff would have been the only practical alternative to constant congressional updating. This was the only way in which such a "flexible tariff" program could have been made to work without hopelessly tieing up Congress. Separation of powers would not be invoked to strike down such a necessary delegation; nor would it be invoked where the direct result would be a crippling of congressional operations.

In 1935, the Court encountered two instances of delegation which it deemed to be violative of the Constitution. These two famous cases are *Panama Refining Co. v. Ryan*[41] and *Schechter Poultry Corp. v. United States*.[42]

These cases are significant for several reasons. They mark the first and only time that a congressional delegation has been struck down. These cases also evidence the continuing attempt by the Court to establish a rule by which congressional delegations may be judged. And finally, the cases demonstrate the ever increasing departure from the imprecise language of the *Field* line of cases; while favoring a more straightforward statement of the pragmatic approach being applied in the decision making process.

Panama involved section 9(c) of the National Industrial Recovery Act (NIRA).[43] The President was given the power to prohibit, by executive order, the transportation in interstate and foreign commerce of petroleum products withdrawn from storage in excess of the amount permitted by state authority.

The Court, still in search of some rule by which delegations could be judged, struck down section 9(c) because there was not a sufficient "standard" to be found in the statute. The Court said: "the Congress has declared no policy, has established no standard, has laid down no rule."[44] From this statement, we once again see the notion that Congress must, to some minimal degree, exercise its policy-making powers before attempting to delegate any part of that power. Separation of powers requires at least this much effort from the Congress. Unless it is forthcoming, the necessities of government, however great, will not be

41. 293 U.S. 388 (1935).
42. 295 U.S. 495 (1935).
43. Act of July 2, 1935, ch. 246, 49 Stat. 375.
44. 293 U.S. 388, 430 (1935).

deemed to outweigh separation of powers considerations. This feeling was more than evident when the Court said:

> If section 9(c) were held to be valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinction nugatory. Instead of performing its law making function, the Congress could at will and as to such subjects as it chose, transfer that function to the President or other offices or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the Constitutional processes of legislation which are an essential part of our system of government.[45]

From this language of the Court it becomes clear that "standards" must accompany a statute, as evidence if you will, that Congress had sufficiently exercised its policy-making power. Complete abdication of responsibility is not acceptable, within the gambit of pragmatic separation of powers, even though the demands of governmental necessity may be high.

Justice Cardozo dissented on the grounds that there were in fact standards sufficient enough to save the statute. Although his is a dissenting opinion, it is important to note that Cardozo also applied the pragmatic separation of powers approach—when he said:

> [T]he separation of powers between the executive and Congress is not a doctrinaire concept to be made use of with pedantic vigor. There must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee today the developments of tomorrow in their nearly infinite variety.[46]

The *Schechter Poultry* case involved section 3 of the *NIRA*.[47] This section gave the President the power to prescribe "codes of fair competition" for various trades and industries. Section 3 was also struck down because of a lack of congressional "standards." With *Schechter* reinforcing *Panama*, it appeared as though the Court had finally formulated the rule it had been attempting to establish—a rule that would permit the Court to judge delegation in a manner consistent with governmental necessity and separation of powers. The rule being that

45. *Id.*
46. 293 U.S. 388, 440 (1935).
47. Act of July 2, 1935, ch. 246, 49 Stat. 375.

—Congress must exercise its policy-making powers at least to the extent of providing standards to guide the manner and extent to which the delegate would exercise the power granted. Without this minimal effort on the part of Congress, separation of powers would be violated.

Justice Cardozo, who had dissented in *Panama* where he felt a sufficient standard could have been inferred, joined the majority in *Schechter*. He voiced his dissatisfaction with the manner in which Congress had performed its legislative function saying:

> [T]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.[48]

There is much to be said for the rule of standards.[49] But, is it workable in all delegation cases; and is it always consistent with pragmatic separation of powers analysis? In subsequent cases it is seen that standards were not always required to accompany delegations of legislative power. This is not to say however, that the requirement of standards has been completely abolished. It has not. There are certain instances and cases in which a delegation of power could be ruinous to the concept of separation of powers if not accompanied by legislative standards. Let us examine those cases in which the requirement of standards has been relaxed.

Yakus v. United States[50] decided the constitutionality of the Emergency Price Control Act of 1942,[51] which directed the Price Administrator to establish regulations fixing maximum prices of commodities and rents. The Act was passed during the Second World War, and was an integral part of the overall war effort. It was designed to stabilize the economic and civilian base upon which the military effort was necessarily dependent. In order to achieve this goal, Congress was forced to delegate broad and flexible powers.

Did pragmatic separation of powers require that standards accompany this Emergency Price legislation? Clearly not. The necessity of effec-

48. 295 U.S. 495, 551 (1935).
49. *See* Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).
50. 321 U.S. 414 (1943).
51. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

tively accomplishing wartime stabilization was so intense as to abrogate the standards requirement. The effect on separation of powers was miniscule compared to the necessity of a broad and flexible delegation of legislative power designed to accomplish an important war time policy. It would be extremely difficult, if not impossible, for the Congress to achieve the goal of war time stabilization without using the vehicle of broad and flexible delegation of power. Under the circumstances, it was clear that Congress had done as much as was practical, and had exercised the essentials of its policy-making function. The Court indicated as much, when it said: The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable . . . .[52]

Lichter v. United States[53] evidences another situation in which the requirement of legislative standards might be inconsistant with a pragmatic approach to separation of powers. *Lichter* involved the Renegotiation Act of 1942.[54] This Act provided for the renegotiation of all contracts made by the War Department, Navy Department, or Maritime Commission. The renegotiation was to be carried out by the Secretary of the department concerned. Like the Emergency Price Control Act of 1942, the Renegotiation Act was an integral part of the overall war effort. The purpose of the Act was to allow immediate production of war materials pursuant to a contract which could later be renegotiated and adjusted so as to eliminate any "excessive profits" which might have resulted from the initial agreement.

The Renegotiation Act was attacked on the grounds that the delegation it contained carried with it too slight a definition of legislative policy and standards. The Court did not agree. The necessity of delegating power in order to accomplish the goal of swift, efficient, and economical production of war materials far outweighed any possible threat to constitutional separation of powers. The Court pointed out:

> The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition . . . . In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it

52. 321 U.S. 414, 424 (1943).
53. 334 U.S. 742 (1948).
54. 50 U.S.C. § 1911 (1964).

> would substantially hinder rather than help them in defending their national safety.[55]

Under such circumstances, requiring a delegation to be accompanied by standards would not have advanced the purposes of the pragmatic separation of powers concept. Much to the contrary, it would have run afoul of that very concept. Therefore, it is not necessary for Congress to supply a specific formula in a field where flexibility and the adoption of the congressional policy in infinitely variable conditions constitutes the essence of the program.

The view that there are instances of delegation not susceptible to the degree of congressional policy-making required by the standards rule can be seen in *Arizona v. California*.[56] This case presented a situation in which standards would have been exceedingly difficult to establish. Under the Boulder Canyon Project Act of 1928,[57] the Secretary of the Interior was given vast power to divide and make use of the waters of the Colorado River. This was an exceptionally complex task, as was pointed out by the Court:

> All this vast interlocking machinery—a dozen major works delivering water according to Congressionally fixed priorities, for home, agricultural, and industrial uses to people spread over thousands of miles—could function effectively only under unitary management. . . . Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the section 5 contract power, to direct, manage, and coordinate their operation.[58]

Requiring the existence of standards on the face of this Act would have been clearly inconsistent with the pragmatic separation of powers approach. The need for administrative action pursuant to delegated power was extremely high. If the goal which Congress sought to attain by passage of the Boulder Canyon Act was to be realized, a broad delegation of power was certainly necessary.

III. Future Developments—Standards?

The *Yakas-Lichter-Arizona* line of cases makes it clear that the delegation doctrine, as it has continued to develop, does not require

55. 334 U.S. 742, 779-80 (1948).
56. 373 U.S. 546 (1963).
57. 43 U.S.C. §§ 617-17T (1964).
58. 373 U.S. 546, 589 (1963).

standards in each and every case of delegation. But, this does not mean that standards will not be required in certain categories, and instances of delegation. Indeed, there are cases in which standards may be the only possible means of achieving balance between governmental necessity and separation of powers. It should be noted that the Court has never declared an intent to abandon the *Panama-Schechter* rule of standards.[59] It has treated these decisions as respected authority, and has been careful to distinguish them.[60] In *Kent v. Dulles*,[61] the Court went so far as to read a statute restrictively in order to avoid a collision with the rule of standards.[62] In *Zemel v. Rusk*,[63] the Court sustained a delegation on the grounds that a sufficient standard did exist.[64]

What role will standards play in the continuing development of the delegation doctrine? When must a delegation be accompanied by standards; and in which cases will standards be unnecessary? It is suggested by this writer that the answer will once again depend upon a pragmatic separation of powers analysis. There will certainly be cases in which the necessity of delegation is very high, while the effect on separation of powers is fairly low—in which case, standards will not be required. But, there will surely be cases in which the effect on separation of powers will be more severe, and the necessity of delegation less demanding—in which case, standards may be required if the delegation is to be sustained. Such a state of affairs would seem to destroy any semblance of a rule regarding delegation. However, there is a very simple rule which may be readily inferred—the rule that Congress must endeavor to exercise as much of its policy-making power as it possibly can, within the practical limitations of the field in which it seeks to delegate. All the relevant factors bearing upon the need for particular delegation must be weighed against its effect on separation of powers.

The final determination as to whether standards will be required to accompany a delegation of power will depend to a large extent on the person or body who is to be the recipient of that power. There are three broad classes of recipients of congressionally delegated powers; and delegations to them have varying effects on the separation of powers principle. The three broad classifications are as follows: (1) agencies created by the Congress, and invested with congressional powers of

59. Merrill, *supra* note 49, at 472.
60. *Id.*
61. 357 U.S. 116 (1958).
62. Merrill, *supra* note 49, at 472.
63. 381 U.S. 1 (1965).
64. Merrill, *supra* note 49, at 472.

regulation over a given field (*e.g.*, F.C.C., I.C.C.); (2) departments or agencies organized under the Executive Department, and vested with powers largely originating in the office of the Presidency (*e.g.* the various cabinet level offices); and, (3) the President of the United States.

If one considers these broad classifications in the order in which they are enumerated, it can readily be seen there exists a natural sliding scale. An increase in the centralization of governmental powers is reflected as one moves from a delegation of power to an administrative agency to a delegation of power to the President.

As has already been said, pragmatic separation of powers involves a balancing of governmental necessity (the element which demands that a delegation be made), with the effect the delegation will have on the separation of powers principle; with legislative standards being a means of assuring that a pragmatic balance has been struck in those cases which pose a major threat to separation of powers.

As the negative effect on separation of powers diminishes, the balance naturally swings in favor of the demands of governmental necessity, and the need for standards correspondingly diminishes. This is borne out by the *Lichter-Yakus-Arizona* line of cases which relaxed the requirement of standards. *Lichter* and *Yakus* involved delegations of power to an administrative agency created by Congress. The *Arizona* case involved a delegation of power to the Secretary of the Interior, thus falling into the second classification mentioned above.

A delegation of power to an administrative agency is unlikely to give rise to a meaningful threat to the separation of powers principle; and for this reason the existence of accompanying standards is of minor importance. Delegating power to an administrative agency tends to decentralize governmental power—spreading it over an enlarged base of governmental activity and organization. The logic of separating power is the logic of governmental checks and balances. By delegating to an administrative agency, governmental power is further polarized.

The primary consideration, when examining a delegation of power to an administrative agency, is not that of separation of powers, but that of accountability. Stnadards may at times be necessary to assure administrative accountability to Congress, but such instances will be rare—and generally speaking, a delegation to an administrative agency accompanied by standards, will not be necessary to assure either accountability or proper separation of powers. Administrative agencies created by Congress are in effect arms of the legislative branch, and as such are

inherently dependent upon the Congress for their future existence and power. Such a relationship carries with it an inherent element of accountability.

The need for adequate accountability was amply stated in *Yakus* when the Court said that a delegation would be valid so long as it "sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[65] From this case it becomes clear that the issue of accountability is of primary importance when judging the validity of delegation to an agency. Inherent in the need for accountability is the need for an adequate basis for judicial review of agency action taken pursuant to the authority granted. So construed, accountability involves a twofold concept. Direct accountability to Congress itself; and accountability to Congress, through the courts, which have the responsibility of checking ultra-vires activities of the agency.

The *Arizona* case involved a delegation of power to the head of an executive department (the Secretary of the Interior)—yet the requirement of standards was relaxed in this case much as it was in *Lichter* and *Yakus*. The *Arizona* case seems to reflect a propensity to treat delegations of power to a congressionally created administrative agency in a manner similar to the delegation of power to an executive department. Such an approach is entirely understandable. Despite the fact a delegation of power to an executive department may tend to centralize governmental power, much as a delegation to the President would, it is likely that the degree of centralization will be minimal because of the essentially autonomous nature of those departments. Although the various department heads are appointed by the President, and are directly accountable to him, the departmental staffs are primarily composed of career bureaucrats who enjoy a significant degree of independence and autonomy.

Except where a delegation of power to an executive department clearly reflects a propensity toward over-centralization within the totality of the executive branch, such a delegation should be treated much the same as a delegation to a congressionally created administrative agency.

Despite the accountability which exists between administrative agencies and the Congress, there nevertheless remains a problem with unguided discretionary power. Professor Kenneth C. Davis has suggested

65. 321 U.S. 414, 425 (1943).

that standards do not provide the best means of dealing with the problem of discretionary power in the hands of administrative agencies. In his treatise on administrative law,[66] Professor Davis recommends that the requirement of standards be abandoned in favor of procedural limitations and due process of law considerations as a means of guarding against the abuse of delegated power. His suggestion places the onus on the administrative agency to set forth standards which will limit its use of discretionary power, while at the same time it provides an element of fundamental fairness. In accordance with this approach, a court reviewing the validity of power delegated to an administrative agency will look to these considerations, and not to the existence of standards.

Having seen there is only a minor separation of powers problem surrounding the delegation of power to an administrative agency, it is apparent that the approach presented by Davis is far superior to the traditional requirement of standards as a means of assuring accountability and prevention of discretionary abuse.

Delegating power to the President, however, raises a more important and fundamental problem than that of acountability or discretionary abuse. It raises the separation of powers problem in its purest sense. We have noted that delegating power to an administrative agency operates to decentralize governmental power; and conversely, we must be aware that delegating power to the President involves a centralization of power which poses a direct threat to the separation of powers theory.

It should be noted that the only two cases in which congressional delegations of power have been struck down involved delegations of power to the President, which were not accompanied by adequate standards. It is equally significant to note that while the Court has relaxed the requirement of standards in cases involving delegations of power to administrative agencies, it has not endeavored to overrule the *Panama* and *Schechter* decisions, or relax the requirement of standards applied in those cases.

The importance of this distinction is clear—while delegations to administrative agencies and executive departments pose a relatively slight threat to constitutional separation of powers, broad and unguided delegations to the President pose a more meaningful threat, and should be accompanied by more meaningful congressional standards.

Over the last fifty years there has been an ever increasing trend toward centralization of governmental powers in the hands of the

66. K. Davis, Administrative Law Treatise 52-53 (Supp. 1970).

President. The trend appears to be irreversible. Past and current emergencies and necessities, coupled with myriad economic, political, and social factors, have tipped the balance of power toward the Chief Executive.[67] Expansion of the executive branch has in many instances resulted in the subservience of Congress or in congressional acceptance of a lesser position in the affairs of their nation.[68] Certainly Congress must take the initiative in maintaining its position as an equal branch of government. But, where it fails to do so by making overly broad delegations of power to the President—it is encumbent upon the courts to assure that constitutional separation of powers is not subverted. When faced with the type of delegation which carries ominous implications for separation of powers, the Court would be remiss in failing to strike down such a delegation if it were not accompanied by meaningful standards.

IV. The Economic Stabilization Act of 1970

The Economic Stabilization Act of 1970,[69] (hereinafter referred to as Act) has granted to the President vast powers over the economy. He has been given power to stabilize prices, rents, wages, and salaries.

Pursuant to the power granted him by the statute, the President issued an Executive Order[70] freezing wages and prices for a period of 90 days. Following this initial action, the President issued another Executive Order[71] establishing a complex system of wage and price controls to be administered by a Cost of Living Council.[72] Various commissions and boards, such as the Pay Board and the Price Commission, were established under the Council in order to perform the day-to-day function of controlling the economy.

It is significant to note that the Act makes no mention of the power to declare a 90 day wage price freeze, nor is there a provision for a Cost of Living Council. Because of the broad language of the Act, and the vast power granted by it, the actions taken by the President can not be said to be in violation of the Act. With this in mind, the issue is the extent to which such a broad delegation of power can be said to be consistent with the principle of pragmatic separation of powers.

67. Forkosch, *supra* note 3, at 532.
68. *Id.*
69. 12 U.S.C. § 1904, note (1964).
70. Exec. Order No. 11615, 36 Fed. Reg. 15727 (1971).
71. Exec. Order No. 11627, 36 Fed. Reg. 20139 (1971).
72. *Id.*, The Cost of Living Council was created by Exec. Order No. 11627.

What is the effect of such a broad delegation on constitutional separation of powers? In relation to the problem which Congress sought to remedy, how necessary is such a broad delegation of powers? Can it be said that Congress adequately exercised its duty and its power to effectuate policy in the area of economic stabilization? Are there sufficient "standards" on the face of the Act to indicate that Congress has adequately exercised its policy making function, and to give guidance to the power delegated by the Act?

These are the questions which must be answered when considering the validity of the delegation found in the Economic Stabilization Act of 1970. In order to get a feel for the problem presented, it is necessary to look briefly at some of the factors which will have a direct bearing upon the determination to be made.

The Act involves a delegation of power to the President, and this is a very important factor. It has already been noted that a delegation to the President involves an inherent centralization of governmental powers, and therefore poses a very real threat to the constitutional separation of powers principle. An extremely broad delegation of power, without standards, greatly compounds the threat, and can only be justified by compelling circumstances.

Can it justifiably be said that the economic situation facing the nation required the granting of broad unlimited powers to the President as a means of dealing with the problem? Rising inflation of the cost-push variety, unemployment, and an increasing trade deficit were the problems which faced the Congress, and led to the passage of the Act.

Congress is undeniably ill equipped to fully develop a comprehensive system of economic stabilization. Even if it were possible, it would probably be undesirable. An effective system of economic stabilization must be built on a flexible base. This can only be accomplished by a certain freedom of administration. Hence, an overly rigid delegation of power, designed to accomplish the goal of economic stabilization, would probably be totally ineffective.

While a certain flexibility of power is necessary because of congressional inadequacies, it can not be said that Congress is totally lacking in ability to develop some basic policy to guide the flexible powers which it places in the hands of the President. Some standards reflecting congressional policy guidance could surely be drawn up to guide the course of a successful system of economic stabilization.

One must look to the Act itself in order to determine whether Congress did in fact fulfill its duty to effectuate policy, and to give guidance to the President. Are there any "standards" evident on the face of the statute which might indicate congressional policy and guidance?

The text of the Economic Stabilization Act is as follows:

> Sec. 201. Short title—This title may be cited as the 'Economic Stabilization Act of 1970.'
>
> Sec. 202. Presidential Authority—(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to provide gross inequities.
>
> Sec. 203. Delegation—The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate.
>
> Sec. 204. Penalty—Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000.
>
> Sec. 205. Injunctions—Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, it may in its discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title.
>
> Sec. 206. Expiration.—The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1972, but such expiration shall not affect any proceeding under section 204 for a violation of any such order or regulation, or for the punishment for contempt committed in the violation of any injunction issued under section 205, committed prior to May 1, 1972.

An amendment to section 202 of the Act is as follows:

> (b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President, after taking into account the seasonal nature of the employment, the rate of

> employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally.

There are two standards which readily appear on the face of the statute. Section 202 established the level at which prices, rents, wages, and salaries are to be stabilized. Such a provision clearly provides guidance for the President, and is some evidence of a congressional effort to fulfill its policy making duties. An amendment to the original act, found in section 202(b), restricts the application of wage and price controls to a single industry unless the President determines that the prices or wages in that industry have increased at a disproportionate rate. This amendment provides a standard which does much to strengthen the otherwise standardless nature of the Act in its original form.

Except for the limitation as to the level at which prices and wages are to be stabilized, and the limitation on selective application of controls, there are no other standards to be found on the face of the statute.

Should the Congress have provided other standards to guide the course of economic stabilization; or, are the above mentioned standards sufficient to sustain the delegation? Should Congress have provided some guidance in regards to the all important questions of "how" and "when" stabilization is to be carried out?

In examining the sufficiency or insufficiency of the standards which accompany the Act, it is wise to do so in perspective. Since there have been only two instances in which delegated power has been found to be lacking in sufficient standards, it might be helpful to briefly compare those situations to the delegation in the Act. It is therefore important to look for a moment at those portions of the NIRA which were struck down in *Panama* and *Schechter*.

The *Panama* decision struck down section 9(c) of the NIRA which provided in part:

> The President is authorized to prohibit the transportation in interstate commerce and foreign commerce of petroleum . . . in excess of the amount to be produced or withdrawn from storage by any state law or order prescribed thereunder. . . .[73]

73. Act of July 2, 1925, ch. 246, 49 Stat. 375.

This provision granted to the President the power to prohibit shipments of "hot oil" in interstate commerce. It should be noted that "what" constituted "hot oil" was to be determined not by the President, but by state law or regulation. It should also be noted that the power delegated to the President—the power of prohibition—was a very specific power which was to be applied to a very narrow subject. Although the Court, in an 8-1 decision, felt no standard could be found in section 9(c), it is at least arguable that a standard did exist because of the narrow area in which the power was to be used. The major inadequacy to be found in section 9(c) is the lack of guidance as to "when" the power of prohibition was to be exercised.

The Economic Stabilization Act suffers from a similar deficiency—that is, an uncertainty as to "when" the power of the Act is to be exercised. Economic stabilization was not made mandatory by the Act and power to determine when the controls were to be applied was left exclusively in the hands of the President.

Moreover, the power granted under the Act is not limited to a narrow subject area, nor is the action to be taken as specific as it was under section 9(c). A grant of power to determine "when" to prohibit the transportation of "hot oil" is exceedingly more limited than the Stabilization Act's power to determine "when" and "how" to stabilize and control the trillion dollar economy of the United States. The grant of power found in the Act clearly outstrips that found in section 9(c), and is more analagous to the vastness of power granted under section 3 of the NIRA.

Section 3 of the NIRA gave the President the power to prescribe "codes of fair competition for various trades and industries." There was no mention in the Act of what constituted "unfair competition," nor was there any mention of "how" such a determination was to be made. This provision of the NIRA is similar to the provisions of the Stabilization Act because the latter grants a broad power to impose broad controls over the entire economy. By unanimous decision in the *Schechter* case, section 3 was struck down as a broad delegation of power without sufficient accompanying standards.

It is clear that the Stabilization Act involves a delegation at least as broad as that of section 3, and much broader than that found in section 9(c), of the NIRA. It must also be said that the Stabilization Act, in light of the two standards which can be found on its face, has little more in the way of legislative guidance than did the NIRA pro-

visions. It is doubtful whether these two standards, as minimal as they are, are sufficient to save the broad delegation found in the Act. The Act still grants a vast amount of unguided power; power to determine the most important aspects of stabilization policy—namely the "how" and "when" of economic controls.

Having seen there is a grave question concerning the sufficiency of the standards which can be found on the face of the Act, let us assume, for the purpose of further analysis, that the Act is lacking in sufficient standards. Is it possible that the Act may still be valid? Might it be possible for the Court to "construct standards" by reference to the legislative history of the Act, and by reference to past experience in the field of economic controls?

The decision in *Kent v. Dulles*[74] would seem to indicate that such an approach is feasible. In *Kent*, the Court employed this very approach—it developed "constructive standards" where the statute in question contained no standards on its face.

Kent involved the Immigration and Nationality Act of 1952,[75] which required the issuance of a passport for foreign travel; and the Act of July 3, 1926[76] which gave the Secretary of State the authority to issue passports. These statutes gave the Secretary very broad powers over the issuance of passports. Pursuant to the powers granted him, the Secretary issued a regulation which prohibited the issuance of a passport to a communist.

The Court held that the Secretary could not deny passports on the basis of a person's beliefs and associations. But, rather than striking down the statute, the Court looked at the long line of congressional acts which had operated to regulate passports (going as far back as 1803) in order to construct a standard for the 1952 Act. The Court also considered an equally long line of executive department decisions, rulings, and regulations. The Court sought to determine whether it could impute to Congress an intended policy which might operate as a standard.

Although the language of the 1952 Act may have been exceedingly broad, the traditional power over passports had long been very narrow. Refusal of passports had traditionally been based on two factors: (1)

74. 357 U.S. 116 (1958); *see also* Zemel v. Rusk, 381 U.S. 1 (1965).
75. 8 U.S.C. § 1185 (1964).
76. Act of July 3, 1926, ch. 43, 44 Stat. 887.

lack of citizenship, and (or) denial of allegiance to the United States; and, (2) engaging in unlawful conduct. These factors became "constructive standards" for the 1952 Act.

The Court said:

> Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative standards. . . . We therefore, hesitate to impute to Congress . . . a purpose to give unbridled discretion to grant or withold a passport from a citizen for any substantive reason he may choose.[77]

If the Stabilization Act is to be sustained as a valid delegation of legislative power there will almost certainly have to be a judicial construction of standards. The standards which do exist on the face of the statute provide grossly inadequate guidance for the vast power which is granted. Permitting the grant of such power, without finding some legislative guidance, would have a devastating effect on the principle of separation of powers. If a pragmatic separation of powers is to be maintained, the Court must honestly endeavor to fill in the "standards gap" which exists on the face of the statute. In order to do so the Court must be able, upon examination of the legislative history as well as past legislative experience in the field of economic controls, to perceive elements of legislative guidance and limitation.

It is important to note that the first case in which the constitutionality of the delegation has been questioned, was decided primarily on the grounds that adequate standards could in fact be constructed. In *Amalgamated Meat Cutters and Butchers of North America, AFL-CIO v. Connally*,[78] a three judge district court panel found the delegation in the Act to be constitutional. The court found that there are two standards on the face of the statute—the "level of stabilization" standard of section 202, and the "uniformity of application" standard of section 202(b). The court also found that additional standards could be deduced from the legislative history of the Act, and from legislative experience in the field of wage and price controls. Although the court placed great emphasis on the existence of these two standards, it felt compelled to examine the legislative history and past legislative experience in order to sustain the constitutionality of the challenged delegation. Specifi-

77. 357 U.S. 116, 128 (1958).
78. 29 Ad. L.2d 493 (D. D.C. 1971).

cally, the court examined the Emergency Price Control Act of 1942,[79] and Title IV of the Defense Production Act of 1950.[80]

In reaching its decision, the court relied heavily on *Yakus v. United States,* which upheld the constitutionality of the Emergency Price Control Act of 1942. The court examined the decision in *Yakus* and the 1942 Act in order to determine whether it could yield some indication of that which Congress sought to accomplish by passage of the 1970 Act.

Although the court was correct in referring to *Yakus* in an attempt to search out standards for the 1970 Act, it relied far too heavily on the rationale of that case. The district court treated *Yakus* as though it were on "all fours" with the case before them. Clearly it is not. There are two important factors which distinguish the passage of the 1942 Act from the passage of the 1970 Act. Both factors bear heavily on the pragmatic separation of powers theory. The 1942 Act delegated power to a Price Administrator who was to promulgate the various price regulations; while the 1970 Act delegated stabilization powers to the President. The 1942 Act was passed as an integral part of a major war effort; while the 1970 Act was not passed as part of a war effort, but as part of a purely economic program. The necessities which militated in favor of the respective delegations of power can not be said to be the same. Similarly, a delegation of power to the President is not the same as the delegation of power to a Price Administrator, for it carries with it more substantial consequences for the separation of powers principle.

In referring to the Emergency Price Control Act of 1942, and Title IV of the Defensive Production Act of 1950, the court agreed with the essentials of the government's contention that there exists a sufficient background of prior law and practice from which adequate standards for the 1970 Act can be deduced. The court said:

> The historical context of the 1970 law is emphasized in the Government's submission: "In enacting the legislation in question here, Congress was, of course, acting against a background of wage and price controls in two wars. The Administrative practice under both of those Acts was the subject of extensive judicial interpretation and review. This substantial background of prior law and practice provides a further framework for assessing whether the Executive has stayed within the bounds authorized by Congress and provides more than adequate standards for the exercise of the

79. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.
80. 50 U.S.C. §§ 2101-02 (1964).

> authority granted by the Act." We think this contention is sound.[81]

The court reviewed the legislative history of the 1970 Act to buttress its finding that it was meant to be guided by the experience gained from the 1942 and 1950 experiments in the field of wage and price controls. The court said:

> Plainly the 1970 legislative purpose set forth in the House Report does not differ in material degree from the statement of legislative purpose in the 1942 legislation upheld in *Yakus*. This purpose was reiterated in debate on the 1970 act.[82]

There is, however, a major problem presented by the district court's decision. Although it concluded that, taken within the context of history, there are in fact standards to be found for the 1970 Act—it did not specify what those standards are, nor what limitations are imposed by them. The court merely held that what the President had done thus far did not exceed that which had been done pursuant to prior wage and price legislation. Such a determination may be entirely correct, but it does little to define the standards which are to govern future action under the 1970 Act.

Clearly, the court did not hold that action taken pursuant to the 1942 and 1950 Acts constitutes the outer limits of action permissible under the 1970 Act. The court said:

> We do not suggest that the 1970 law was intended as or constitutes a duplicate of the earlier laws. . . . The approaches and decisions under the earlier laws are certainly not frozen as guidelines for the present law.[83]

There appears to be a certain dichotomy in the decision of the district court. On the one hand, the court has held that the 1942 and 1950 Acts provide a context of standards which can be applied to the 1970 Act. On the other hand, the court held that action taken pursuant to the 1970 Act will not be limited by the prior statutes. This is similar to saying—the prior Acts provide standards, but the 1970 Act is not bound by those standards, This dichotomy can only be removed by a clear statement of those standards which can be inferred from the prior legislation. Only in this way can it be said there is a tangible

81. 29 AD. L.2D 493, 502 (D. D.C. 1971).
82. *Id.* at 505.
83. *Id.* at 503.

measure of guidance provided by the prior laws. It is regrettable that the district court failed to clearly enunciate those standards which it found to exist in support of the Economic Stabilization Act.

Conclusion

Should the Supreme Court decide to rule on the constitutionality of the Economic Stabilization Act of 1970, it is almost certain that they will employ the same basic approach which was applied by the district court in the *Amalgamated Meat Cutters* case. The Court will certainly find it most difficult to sustain the delegation solely on the strength of those standards which can be found on the face of the statute. The Court will necessarily turn to the technique of constructing standards in order to fill in the gap which exists.

If the Supreme Court sustains the validity of the delegation on the grounds that adequate standards can be inferred, it is hoped they will also do that which the district court failed to do. Hopefully, the Supreme Court will clearly enunciate those standards which it finds to be in support of the power delegated by the Economic Stabilization Act. By so doing, the Court will be reinforcing, and sustaining, a governmental system based on the theory of pragmatic separation of powers.

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